Supreme Court, U.S.
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No. 01-314

IN THE

Supreme Court of the United States

JEFFREY BARRINGTON,

Petitioner,

v.

AARON C. ERMINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. After the jury found that Petitioner Jeffrey Barrington, a police officer, violated Respondent Aaron Ermine's constitutional rights by using excessive force, the trial court awarded him $1 in nominal damages. Relying on the factors set forth in Justice O'Connor's concurrence in *Farrar v. Hobby*, the trial court awarded Ermine 50% of his requested attorney's fees. The Washington Supreme Court unanimously affirmed this award. Is this unanimous affirmation in harmony with *Farrar*?

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REASON FOR DENYING THE WRIT

This Court should deny Petitioner's Writ because the unanimous decision of the Washington Supreme Court is in harmony with *Farrar*.

In *Farrar*, this Court declined to adopt a per se rule that says a § 1983 plaintiff who only receives nominal damages is never entitled to an award of attorney's fees.

In this case, the Washington Supreme Court similarly declined to adopt a per se rule that says a § 1983 plaintiff who only receives nominal damages is never entitled to an award of attorney's fees.

Essentially, Barrington argues that the Washington Supreme Court erred because it should have adopted a per se rule because that is what the United States Supreme Court meant to do in *Farrar*. This Court should reject this tortuous argument.

Like this Court did in *Farrar*, the Washington Supreme Court left the decision of whether to award attorney's fees to a nominal-damages plaintiff up to the discretion of the trial court. In contrast to *Farrar* and the Washington Supreme Court, Barrington seeks to wrest all discretion away from the trial court.

By seeking to wrest all discretion away from the trial court, Barrington invites this Court to create new law. In contrast, Ermine respectfully invites this Court deny Barrington's Petition for Writ of Certiorari.

STATEMENT OF FACTS

A. Factual Background.

On March 24, 1995, Ermine was involved in a high speed chase. Ermine's role: unfortunate passenger.

During the chase, Ermine was aware the police were trying to catch the car. He tried to get the driver to stop. Ermine turned the car off, tried pulling the keys out the ignition, tried putting the car in reverse, and threw the car out of gear. He also tried to jump out of the car five or six times when the car would slow around a corner. Damage to the car caused it to roll to a stop in a park.

When the car came to a stop, Ermine got out of the car on the passenger's side, put his hands up, and starting walking towards the back of the car. He was right about at the back of the car when he first saw Barrington.

Barrington yelled, "Get down on the ground!" Obediently, Ermine started to kneel to one knee. As he was down on one knee, Barrington grabbed him by the back of his head and slammed Ermine's face down to the concrete. Barrington then beat him several times in the back of the head and neck area. Ermine covered his head with his hands and curled up in a ball. Barrington continued to beat him.

During the beating, Barrington told Ermine, "That will teach you to fuck with the cops."

At trial, Ermine requested damages in the amount of $6,112. The jury found that Barrington used excessive force.

B. The Reasoning of the Trial Court.

The trial court awarded Ermine $1 in nominal damages and 50% of the attorney's fees requested. This amount equalled $9,920.

The trial court stated:

> I think Farrar stands for the proposition appropriately that one has to look at the award and judge it accordingly. At the same time, I think I still have to consider the fact that the jury came back with a verdict in favor of Mr. Ermine. And that the purpose of these statutory provisions are exactly as [Plaintiff's Counsel] has argued, that the intent is to discourage discriminatory or inappropriate activity on the parts of the citizens who may suffer the consequences of this kind of act.
>
> And so I think that based upon Farrar and based upon the verdict that was rendered, I have no choice but to reduce the attorney's fees. But, I still think that some fairly substantial attorney's fees are appropriate, and that is the basis on which I make the decision of 50 percent.

Later, the trial court stated:

> On the issues for attorney's fees and the motion for reconsideration, clearly the success is an issue there. And I don't think there is any question but what the Court uses that as one of the criteria by which to determine whether or not attorney's fees should be granted.

> Under the circumstances, again, based upon the jury's verdict and trying to weigh the evidence in the appropriate manner, considering the jury's decision and all aspects of that, I can only conclude that there is the right to some attorney's fees.
>
> If I had not considered the factor of the damages, I would have granted substantially more attorney's fees. But having considered that factor and having considered the issue of there only having been a nominal recovery, the attorney's fees in the amount of $10,000 are, in the Court's view, appropriate.

The Washington Supreme Court unanimously affirmed this decision.

ARGUMENT

A. THE WASHINGTON SUPREME COURT'S UNANIMOUS DECISION IS IN HARMONY WITH THE LEGISLATIVE INTENT EXPRESSED IN 42 U.S.C. § 1988 AND WITH THE HOLDING OF *FARRAR v. HOBBY.*

This Court should deny Barrington's Petition for Writ of Certiorari because the Washington State's unanimous decision was based on an accurate view of federal law.

1. *According to Congress, whether to award attorney's fees to a nominal-damages plaintiff is within the trial court's discretion.*

Under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, a court may award reasonable attorneys' fees to a prevailing party in a civil rights action. In the absence of special circumstances, a prevailing party should recover reasonable attorneys' fees.[1]

Congress has never amended this statute to say that a court shall not award reasonable attorneys' fees to a prevailing party who receives nominal damages only. Congress still allows a trial court to properly exercise its discretion and award attorneys' fees in nominal-damages cases.

2. *According the United States Supreme Court, whether to award attorney's fees to a nominal-damages plaintiff is within the trial court's discretion.*

In *Hensley v. Eckerhart*,[2] this Court stated that because of the trial court's superior understanding of the litigation and the desirability of avoiding frequent appellant review of what essentially are factual matters, courts have re-emphasized that the trial court has discretion in determining the amount of the fee award. The trial court is in the best position to ascribe a reasonable value to the lawyering it has witnessed and the results that lawyering has achieved.

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1. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986), *reh'g denied and opinion amended*, 808 F.2d 1373 (9th Cir. 1987) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 429, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

2. 461 U.S. 424, 437, 103, S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

In *Farrar*, this Court stated:

> Having considered the amount and nature of damages awarded, **the [trial] court may lawfully award low fees** or no fees without reciting the 12 factors bearing on reasonableness, see *Hensley*, 416 U.S., at 430 n.3, or multiplying "the number of hours reasonably expended . . . by a reasonably hourly rate." *id.* at 433.[3]

Thus, because the trial court considered the amount and nature before it awarded 50% of the requested attorney's fees, it lawfully awarded a low fee.

3. *According to Farrar's progeny, whether to award attorney's fees to a nominal-damages plaintiff is within the trial court's discretion.*

Relying on the lone opinion of *Norris v. Sysco Corp.*,[4] a Title VII case, Barrington argues that there is conflict and confusion among the federal court with regards to Justice O'Connor's concurrence.

In *Norris*, the defendant argued that "where a plaintiff recovers nothing at all, the attorney's fee must still be proportional, and that means [] that the only correct proportion would be zero. For that proposition [the defendant] point[ed] to Farrar."[5]

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3. *Farrar v. Hobby*, 506 U.S. 103, 115, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (emphasis added).

4. 191 F.3d 1043 (9th Cir. 1999).

5. *Norris*, 191 F.3d at 1050.

In response to this argument, the Ninth Circuit stated, "[D]efendant's attack is not without force, but, ultimately, it cannot prevail and it is driven back upon its own bulwarks."[6]

Other federal courts have driven back this same argument upon its own bulwarks. They also recognize that *Farrar* does not set forth a per se rule that attorney's fees are improper when only nominal damages are obtained.[7]

Many federal courts rely on Justice O'Connor's concurrence in *Farrar* in determining whether the trial properly exercised its discretion. For example, in *O'Conner v. Huard*,[8] the First Circuit invoked the factors set forth in Justice O'Connor's concurrence in *Farrar* and upheld a lodestar-based award of attorney's fees to a prisoner who received $1 in compensatory damages.

In *Cabrera v. Jakabovitz*,[9] the Second Circuit invoked Justice O'Connor's analysis as controlling.

In *Clark v. Sims*,[10] the Fourth Circuit rejected the argument that a plaintiff who receives only nominal damages necessarily is entitled to no fee award.

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6. *Norris*, 191 F.3d at 1050.

7. *See, e.g., Milton v. City of Des Moines*, 47 F.3d 944, 946 (8th Cir. 1995); *Wilcox v. City of Reno*, 42 F.2d 550, 554. (9th Cir.).

8. 117 F.3d 12, 17-18 (1st Cir. 1997).

9. 24 F.3d 372 (2d Cir. 1994).

10. 28 F.3d 420, 424-25 (4th Cir. 1994).

In *Bridges v. Mallett-Goodwin*,[11] the Sixth Circuit required the trial court to make specific findings why it awarded attorney's fees to the plaintiff who received $1. In this case, the trial court did provide specific findings on how it arrived at its award.

In *Johnson v. Lafayete Fire Fighters Ass'n Loc. 472*,[12] the Seventh Circuit expressly adopted a three-part test, derived directly from Justice O'Conner's *Farrar* concurrence, for determining "whether a prevailing party has achieved a mere technical victory inappropriate for fees."[13]

In *Muhammed v. Lockhart*,[14] the Eighth Circuit used Justice O' Connor's concurrence as guidance and upheld an award of attorney's fees to a prisoner who received a nominal damage award because the prison compelled him to wear ill-fitting shoes or because it violated his procedural due process rights.

In *Morales v. San Rafael*,[15] the Ninth Circuit quoted O'Conner's concurring opinion in *Farrar* with favor. It stated:

> Whether the plaintiff's success is purely technical or de minimis is determined by

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11. 45 F.3d 430 (6th Cir. 1994).

12. 51 F.3d 726 (7th Cir. 1995).

13. *Morales v. City of San Rafael*, 96 F.3d 359, 363 n.7 (9th Cir. 1996).

14. 104 F.3d 106 (8th Cir. 1997).

15. 96 F.3d 359.

> examining other factors in addition to the amount of money damages awarded. Primary among such other considerations is the significance of the legal issues on which the plaintiff claims to have prevailed and the public purpose the plaintiff's litigation served. In her concurring opinion, Justice O'Conner makes it clear that not all nominal damages are de minimis.[16]

In *Phelps v. Hamilton*,[17] the Tenth Circuit proceeded directly to Justice O'Conner's three-factor test set forth in her *Farrar* concurrence for guidance in reversing the district court's denial of all § 1988 fees.

As illustrated by these representative cases, recent federal court of appeals' decisions reflect a continuing heavy reliance on Justice O'Connor's concurring opinion in *Farrar* in determining whether a prevailing party should receive a § 1988 fee award.[18] Contrary to Barrington's argument, widespread confusion on whether to rely on Justice O'Connor's concurrence is absent among the federal courts.

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16. *Morales*, 96 F.3d at 359. *See also Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997).

17. 120 F.3d 1126 (10th Cir. 1997).

18. Martin A. Schwartz and John E. Kirlin, *Section 1983 Litigation Statutory Attorney's Fees*, Third Edition, Volume 2, 2001-2 Cumulative Supplement, 26-27 (2001).

4. *According to the Washington Supreme Court, whether to award attorney's fees to a nominal-damages plaintiff is within the trial court's discretion.*

In affirming the decision of the trial court to award attorney's fees, the Washington Supreme Court relied upon the three factors set forth in Justice O'Connor's concurring opinion. It stated:

> While we recognize that Justice O'Connor's separate concurring opinion is not binding, we find, as have other court, that the factors she suggests are helpful in determining whether a plaintiff who has received only nominal damages on a § 1983 claim falls within the "narrow category of cases [under *Farrar*] where no attorney's fees should be awarded." *Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997).

By relying on these three factors, the Washington Supreme Court took the same approach followed by other courts. Barrington gravely argues that following such an approach is error. Ermine suggests that relying on precedent is not error, but the bedrock of our legal system.

5. *Breaking away from Farrar, Farrar's progeny, and the Washington Supreme Court, Barrington seeks a new rule of law that says, "nominal-damages plaintiffs are never entitled to an award of attorney's fees."*

Barrington must embark upon this unlikely adventure because the three factors set forth in Justice O'Connor's concurrence support the trial's court decision to award 50% of the requested fees.

Under this three-part test, a court should look at (1) the difference between the judgment recovered and the judgment sought, (2) the significance of the legal issue on which the plaintiff prevailed, and (3) the public purpose of the litigation.[19]

This brief will address these factors in order.

a. The difference between the judgment recovered and the judgment sought.

Here, there was not a significant difference between the amount of damages recovered and the amount of damages sought. Firstly, when Ermine requested a trial date, he put it in writing that his case was worth less than $35,000. Thus, Barrington misleads this Court when it argues this was a $500,000 case. By arguing that once Ermine requested a trial *de novo* he was no longer limited to the $35,000 in mandatory arbitration, he is accusing this writer of making a false statement to the trial court. Such is not the case.

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19. *Johnson v. LaFayette Fire Fighters Ass'n Loc. 473*, 51 F.3d 726, 731 (7th Cir. 1995).

If Petitioner's attorneys were truly honest with this court, they would have to admit they treated Ermine's case as a small case because it was a small case.

Second, the fact that Ermine only asked the jury for $6,112 confirms that this case was tried as a small case.

Barrington speculates that Ermine asked for such a modest amount only because the trial court dismissed the proverbial deep pocket of the City of Spokane. RCW 4.96.041(4) takes the force out of this speculation. This statute states that if a court enters a judgment against an employee under 42 U.S.C. § 1981, *et seq.*, the judgment creditor shall seek satisfaction for nonpunitive damages from the local government entity.

Because of this statute and because punitive damages were never available against the City of Spokane, Ermine was in the same position at closing argument as he was before the City of Spokane was officially dismissed. Hence, the City of Spokane's dismissal did not change the amount requested in closing argument one iota.

Third, Barrington misconstrues this Court's use of the word "sought." In *Farrar*, when the Court stated Farrar sought $17 million, it referred to the amount he asked the jury to award him. When Ermine was in front of the ultimate decision-maker, he sought $6,112. Thus, in determining the amount Ermine sought, the relevant figure is the amount he asked the jury to award him.

Fourth, because Ermine sought a modest amount, his case is unlike *Farrar*. Farrar demanded $17 million. After ten years of litigation and two trips to the Courts of Appeals,

he got $1.[20] In contrast, Ermine went through mandatory arbitration and one trial. Ermine did nothing to delay the time it took his case to get to trial.

Finally, the trial court merely did what has been done in other courts. For example, in *Jones v. Lockhart*,[21] Jones requested $860,000 and received $2. The Eighth Circuit awarded Jones $10,000 in attorney's fees, and it stated, "the award does not produce a 'windfall' to counsel."[22]

In *Wilcox v. City of Reno*[23], the jury awarded Wilcox $1 in damages because an officer twice punched him in the face in the course of an arrest. The Ninth Circuit affirmed the award of $66,535 in fees.[24]

In *Gillen v. Gates*,[25] two Los Angeles police officers searched plaintiff's carry on bag and her suitcase. The jury awarded her $1.00 in nominal damages and $300 in punitive damages. Plaintiff's counsel was awarded a fee of $16,562.50.[26]

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20. *Farrar*, 506 U.S. at 111.

21. 29 F.3d 422, 424 (8th Cir 1994).

22. *Jones*, 29 F.3d at 424.

23. 42 F.3d 550 (9th Cir. 1994).

24. *Wilcox*, 42 F.3d at 551.

25. 847 F. Supp. 1475 (C.D. Cal. 1994).

26. *Gillen*, 847 F. Supp. at 1482.

In *Lucas v. Guyton*,[27] the jury found for Lucas in the amount of $0.10.[28] The trial court awarded Lucas reasonable attorney's fees of $29,516.50.[29]

In *Piper v. Oliver*,[30] the trial court awarded Piper $1 in nominal damages because a police officer detained him in violation of his Fourth Amendment rights. The Court awarded $7,500 to cover fees and costs.[31]

In *Brandau v. Kansas*,[32] the trial court awarded Brandau $1 in nominal damages because she prevailed on her hostile work environment sexual harassment claim. Even though the defendant argued that Farrar prevented an award, the Court awarded $41,598.13 in attorney's fees.[33]

In *Carlo v. City of Chino*,[34] the trial court awarded Carlo $1 in nominal damages because defendant deprived her of her constitutional right to make a telephone call.[35] Citing

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27. 901 F. Supp. 1047 (D.S.C. 1995).

28. *Lucas*, 901 F. Supp. at 1050.

29. *Lucas*, 901 F. Supp. at 1051.

30. 69 F.3d 875, 876 (8th Cir. 1995).

31. 69 F.3d 875, 876 (8th Cir. 1995).

32. 168 F.3d 1179 (10th Cir. 1999).

33. *Brandau*, 168 F.3d at 1181.

34. 105 F.3d 493 (9th Cir. 1997).

35. *Carlo*, 105 F.3d at 495.

Farrar, the Ninth Circuit held "Carlo is the prevailing party and as such is entitled to attorney's fees. . . ."[36]

In *Muhammed v Lockhart*,[37] a prisoner received a nominal damage award because the prison compelled him to wear ill-fitting shoes or because it violated his procedural due process rights. The Eighth Circuit upheld the award of attorney's fees to the prisoner.

Like the courts in the eight cases cited above, the trial court in this case was well within its discretionary bounds in awarding attorney's fees to Ermine. By affirming the trial court's award, the Washington Supreme decided properly.

b. The significance of the legal issue on which the plaintiff prevailed.

The United States Supreme Court has recognized that a plaintiff who obtains relief in a civil rights lawsuit, especially "in the area of individual, police misconduct," acts as a private attorney general deterring future violations and that, therefore, consistent with congressional intent, "reasonable attorney's fees . . . are not conditioned upon and need not be proportionate to an award of money damages."[38]

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36. *Carlo*, 105 F.3d at 502.

37. 104 F.3d 106 (8th Cir. 1997).

38. *City of Riverside v. Riviera*, 477 U.S. 561, 574-76, 106 S. Ct. 2686, 2694-95, 91 L. Ed. 2d 466 (1986).

"The right to be free from excessive force is one of the premises upon which this great nation was founded and that right continues to distinguish this nation today."[39]

The Eighth Circuit found, "the vindication of the Constitutional Right to be free from cruel and unusual punishment is a significant legal issue in contrast to the injury to the business interest alleged in Farrar."[40]

Likewise, Ermine's vindication of his Constitutional Right to be free from excessive force is a significant legal issue in contrast to the injury to the business interest alleged in *Farrar*.

6. *The public purpose of the litigation.*

A public goal is accomplished if the plaintiff's victory encourages attorneys to represent civil rights litigants.[41]

"[42 U.S.C. § 1988] is a tool that insures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory."[42]

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39. *See Lucas*, 901 F. Supp. at 1055.

40. *Jones*, 29 F.3d at 424.

41. *See, e.g., O'Conner*, 177 F.3d at 18 (noting that the plaintiff's victory was not de minimis because, among other things, it provided an incentive to attorneys to represent civil rights litigants such as the plaintiff and it served as a deterrent to future abuses).

42. *See City of Riverside*, 477 U.S. 561.

Betrayed by his own actions, Barrington insincerely argues that no reasonable person would pay an attorney $9,920 to lose $999. Here, the original judgment was $10,156.22. The amended judgment is $24,050.06. If his own legal fees and cost are added to this amount, Barrington has already spent substantially more money than he is trying save.

Much of our most high minded rhetoric has never assumed that measures to preserve our liberties had to be cost effective.[43]

Vindication of civil rights has an especially high national priority, and, so, some premium over the actual amount of recovery might be allowed by courts in their measured exercise of discretion in cases where the amount recovered is small in comparison with the attorney's fees claimed, so as to give extra incentive to serve as private attorneys in general. In this way, the generalized public purpose of the other wise private suit would be given recognition.[44]

The deterrent effect of a nominal award serves "the public purpose of helping to protect [the plaintiff] and persons like him from being subjected to similar unlawful treatment in the future."[45]

By giving incentive to attorney's to represent civil right litigants and by deterring Barrington from using excessive force in the future, his case served a public purpose.

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43. *Cullens v. Georgia Dept. of Trans.*, 827 F. Supp. 756, 764 (M.D. Ga. 1993).

44. *Cullens*, 827 F. Supp. at 764.

45. *Hashimoto*, 118 F.3d at 678.

In sum, because the trial court did take into consideration the difference between the amount of damages requested and amount of damages, because Ermine did prevail on a significant legal issue and because Ermine's victory furthered an important public policy, the trial court's award of attorney's fees was based on an accurate view of the law. Likewise, the Washington Supreme Court's decision to affirm the award was based upon an accurate view of federal law.

B. REASONABLE ATTORNEY'S FEES AND COSTS.

Ermine is entitled to reimbursement from Barrington for the reasonable attorney's fees Ermine incurred in responding to Barrington's Petition for Writ of Certiorari.

> [When the] defendant appeals and the plaintiff incurs expenses in defending against the appeal that are reasonable even though they are not crowned by complete success, ordinarily he should be entitled to reimbursement of those fees; he had no choice but to incur them or forfeit his victory in the [trial] court.[46]

Ermine also requests attorney's fees and costs pursuant to Supreme Court Rules 42 and 43.

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46. *Ustrak v. Fairman*, 851 F.2d 983, 990 (7th Cir. 1988).

CONCLUSION

Like the *Farrar* decision, the Washington Supreme Court's decision simply stands for the principle that trial courts must evaluate a request for an award of attorney's fees on a case-by-case basis.

The trial court's award of reasonable attorney's fees was based upon an accurate view of the law because:

- the trial court reduced the amount of fees requested by 50%;
- the trial court properly found Ermine vindicated his constitutional rights; and
- the trial court properly found that an award of attorney's fees would further the goals of 42 U.S.C. §§ 1983 and 1988.

Because the trial court's decision was based on an accurate view of the law, the Washington Supreme Court properly affirmed the decision. Thus, Ermine respectfully requests this Court to deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

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